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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: GENERIC PHARMACEUTICALS PRICING ANTITRUST LITIGATION	MDL 2724 16-MD-2724
THIS DOCUMENT RELATES TO: *ALL ACTIONS*	HON. CYNTHIA M. RUFE

CERTAIN DEFENDANTS' RESPONSE IN SUPPORT OF THEIR MEMORANDUM CONCERNING THE REVISED BELLWETHER SELECTION

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The undersigned Defendants ("Defendants") respectfully submit this response memorandum pursuant to Pretrial Orders Nos. 154 and 157, and the Court's memorandum opinion of February 9, 2021 (ECF No. 1679) (the "February 9 Opinion"), granting Defendant Teva Pharmaceuticals USA, Inc.'s ("Teva") motion for reconsideration and vacating Pretrial Order No. 132 on the selection of bellwether cases.[1]

PRELIMINARY STATEMENT

State Plaintiffs' preferred option for a replacement bellwether, *i.e.*, the Dermatology action,[2] does not "avoid" the concerns that led this Court to vacate its initial selection of the Teva-Centric action. Instead, it amplifies them. The same concerns underpinning the Court's vacating of the Teva-Centric action apply to the Dermatology action. Specifically, this Court vacated the Teva-Centric action because "the indictment of the key corporate Defendant in the Teva-centric and pravastatin bellwether cases constitutes a significant change in circumstances." (February 9 Opinion at 3.) And "[a]lthough a corporate Defendant cannot assert a Fifth Amendment right on its own behalf, there are individual interests at stake." (*Id.*) These same concerns underlie the Dermatology action.

The State Plaintiffs' Heritage-Centric action is the only State Plaintiff case appropriate to replace the Teva-Centric action as a bellwether, rather than the Dermatology action, because:

1. the Heritage-Centric action alleges a representative and simpler overarching conspiracy case, and is more procedurally advanced than the Dermatology action;
2. the Dermatology action involves an indicted individual Defendant, Ara Aprahamian, whom State Plaintiffs feature in the Dermatology complaint and

[1] Nothing in this brief should be construed as a waiver of the right of any Defendant to seek remand with respect to any case transferred into this Court for consolidated pre-trial proceedings under 28 U. S. C. § 1407(a).

[2] *The State of Connecticut, et al. v. Sandoz, Inc., et al.*, Civil Action No. 2:20-cv-03539 (E.D. Pa. June 10, 2020), ECF No. 1 (the "Dermatology action").

whose individual due process interests are acutely at stake if that action is selected as the bellwether;

3. the Dermatology action implicates a number of Teva Indictment[3] products—State Plaintiffs explicitly reference allegations in the Teva-Centric action along with alleged communications of Teva employees as "further support" and "context" for the allegations in the Dermatology action; and
4. contrary to their suggestion that efficiency can only be gained if the Dermatology action is the bellwether, State Plaintiffs' discovery coordination with other plaintiffs can proceed normally regardless of bellwether selection.

For these reasons, and as explained further below, the undersigned Defendants respectfully request that the Court confirm the Heritage-Centric action as the "appropriate choice for a bellwether." (February 9 Opinion at 4.)

ARGUMENT

I. The Heritage-Centric Action Is The Only State Plaintiff Action That Meets The Court's Bellwether Selection Criteria

Courts should select bellwether actions that are (1) representative of other actions—in allegations and participants—to provide adequate direction to parties on remaining actions, and (2) sufficiently procedurally advanced. *See, e.g.*, Federal Judicial Center Pocket Guide Series, *Bellwether Trials in MDL Proceedings,* A Guide for Transferee Judges at 4 (2019). The Heritage-Centric action is both. The Dermatology action is neither.

First, bellwether trials "provide knowledge and experience" that inform the litigating parties in settlement negotiations or continued litigation. *See* Eldon E. Fallon, Jeremy T. Brabill,

[3] *United States v. Teva Pharmaceuticals, USA, Inc. and Glenmark Pharmaceuticals Inc., USA*, No. 20-CR-00200-RBS, ECF No. 28 (E.D. Pa. Aug. 25, 2020) (the "Teva Indictment").

and Robert Wayne Picard, "Bellwether Trials in Multidistrict Litigation," 82 Tulane L. Rev. 2323, 2325. Here, State Plaintiffs correctly note that the value of an "overarching conspiracy bellwether [is] to provide some guidance to all parties about how an overarching conspiracy claim tries and how a jury reacts to it." (Memorandum Relating to Revised Bellwether Selection by State Attorneys General Plaintiffs, ECF. No. 1702 at 12 ("States' Br.").) The Heritage-Centric action, which the State Plaintiffs touted to the press as one of their most significant enforcement actions, meets these criteria.

State Plaintiffs themselves have described allegations from their Heritage-Centric action as "shocking" and "mind-blowing," and the alleged harm as "real" and imposing a "financial burden" on the American public.[4] It is surprising for them to now try to marginalize the Heritage-Centric action by arguing that the action somehow would "fail to focus any of the major Defendants on their true exposure." (States' Br. at 9.) The dollar values at stake in any of these cases is serious, particularly given allegations of an "overarching conspiracy" carrying joint and several liability and treble damages, not to mention state-law civil penalties.

Implicit in the State Plaintiffs' argument is that they are not really seeking guidance, but *in terrorem* effect. A bellwether that is potentially higher value will not "giv[e] the parties an early understanding of the strengths and weaknesses of each party's position" any more effectively than any other bellwether. *See* Federal Judicial Center Pocket Guide Series, *Bellwether Trials in MDL Proceedings,* A Guide for Transferee Judges at 4–5 (2019). State Plaintiffs seem to hope that the Dermatology action will effectively frighten Defendants into settlement because it potentially reflects a higher level of exposure, but that is not the guidance

[4] State of Connecticut Press Release, AG Jepsen Leads Coalition in New, Expanded Complaint in Federal Generic Drug Antitrust Lawsuit (Oct. 31, 2017), https://portal.ct.gov/AG/Press-Releases-Archived/2017-Press-Releases/AG-Jepsen-Leads-Coalition-in-New-Expanded-Complaint-in-Federal-Generic-Drug-Antitrust-Lawsuit. Defendants disagree with State Plaintiffs' characterization of their allegations.

that bellwethers are intended to provide. *See id.* Were it otherwise, courts would simply select the highest-value case to serve as a bellwether in every instance.

The injuries alleged, types of claims brought, applicable law, and types of Defendants involved in the Heritage-Centric action are representative of those in the other overarching conspiracy actions. Thus, the Heritage-Centric action squarely fits the bellwether selection criteria. *See* Federal Judicial Center Pocket Guide Series, *Bellwether Trials in MDL Proceedings,* A Guide for Transferee Judges 22 (2019).

State Plaintiffs principally rely on the larger scope of the Dermatology action in their plea to advance it as the bellwether. But a larger number of products and higher volume of commerce do not necessarily make a better bellwether—especially at the expense of Constitutional due process, delay, and other considerations addressed herein. The larger scale and scope also translate to greater complexity and time. That complexity is amplified, as described below, by Mr. Aprahamian's central role in the Dermatology action, and his pending criminal trial. The Dermatology action, with 80 different products, will be more complex for a jury to evaluate than the Heritage-Centric action, which involves a still-substantial 15 products. And if the Heritage-Centric action proceeds, extrapolating guidance from a 15-product case can be done more efficiently.

Second, procedural differences between the cases make the Heritage-Centric action the only appropriate selection to replace the Teva-Centric action. State Plaintiffs claim that the Dermatology action was the result of a "long investigation" and is "advanced factually." (States' Br. at 13). Presumably the State Plaintiffs conducted an equally thorough investigation of the Heritage-Centric action and deemed it sufficiently advanced factually to warrant bringing their lawsuit. More significantly from a bellwether selection perspective, however, the Dermatology

action is not at all advanced *procedurally*—particularly relative to the Heritage-Centric action. The procedural hurdles facing the Dermatology action would create significant delay.

The States' Dermatology action is far behind the Heritage-Centric action in both discovery and motion practice. Specifically:

- The Heritage-Centric action is part of Phase 1 Discovery of this MDL while the Dermatology action is part of Phase 2 Discovery. (*See* PTO 153, ECF No. 1648 at 2 (describing Phase 2 discovery as encompassing complaints filed between September 2, 2019 and December 15, 2020).) While Phase 1 document and data discovery is substantially complete, Phase 2 is in the beginning stages and is not likely to be completed in the near term—the parties are still continuing good-faith negotiations.
- The initial responsive pleadings in the Dermatology action—answers or motions to dismiss—have not even been filed.[5] Motions to dismiss in the Heritage-Centric action, on the other hand, have been litigated and are resolved but for certain motions, which are fully briefed.[6]

The inevitable delay that would attend the selection of the Dermatology action as a

[5] Moreover, as noted in Certain Defendants' Motion to Dismiss the Plaintiff States' October 31, 2019 Amended Complaint for Violating the Doctrine Against Claim Splitting, the Dermatology action similarly violates the doctrine against claim splitting by repeating and re-alleging many of the same allegations in support of a purported "overarching conspiracy" as a basis for joint and several liability. *See* No. 19-cv-2407 ECF No. 186-1 at 1-2 n.1. At the appropriate time, certain Defendants intend to move to dismiss the Dermatology action for similar reasons, which if successful even in part, would leave the Heritage-Centric action as the only remaining state action with an "overarching" theory of joint and several liability—further counseling in favor of selecting the Heritage-Centric action as a bellwether action.

[6] Ascend also filed a submission pursuant to PTO 157. (ECF No. 1704.) Ascend's position only highlights the guidance the Heritage-Centric action can provide to the parties. Ascend objects to the selection of the Heritage-Centric complaint not on the merits of the case as a bellwether, but because Ascend believes that it is not a proper defendant in that case *regardless* of when the case is sequenced. (Ascend Br. at 1). Selecting the Heritage-Centric action as the bellwether, however, will effectively address Ascend's concerns by prioritizing resolution of its and others' motions to dismiss that remain pending in the case. Those resolutions will provide guidance for similarly situated defendants in other MDL cases remaining to be litigated. Ultimately, Ascend's arguments do not call into question the suitability of the Heritage-Centric action as an appropriate bellwether.

bellwether, given its nascent state, weighs heavily against its selection. If the Heritage-Centric action proceeds as the bellwether, guidance is more likely to happen sooner.

II. The Dermatology Action Will Reintroduce—Not "Avoid"—The Concerns That Led The Court To Vacate Its Prior Bellwether Selection

State Plaintiffs note that Teva is named as a Defendant for certain products at issue in the Heritage-Centric action. (States' Br. at 8.) This argument is a diversion as they neglect to mention that ***none*** of the products in the Heritage-Centric action is included in the Teva Indictment—therefore they do not implicate the same degree of concerns identified by the Court in vacating the initial bellwether selections. The same is not true for the Dermatology action, which identifies 10 of the 14 products on which Teva was indicted. State Plaintiffs directly seek relief on three of those products in the Dermatology action and include the remaining seven to "provide further support for" the case. The Dermatology complaint contains 115 references to Teva, and specifically identifies four of Teva's current or former employees in describing allegedly collusive conduct. *See generally* Dermatology Complaint.

State Plaintiffs' argument ignores these and other critical facts, including: (a) an individual Defendant in the Dermatology action, Mr. Aprahamian, has been indicted for alleged conduct relating to the Dermatology action, and Mr. Aprahamian has due process interests equal to or greater than the Teva interests that prompted this Court's reconsideration; and (b) ***Teva*** has acknowledged that the Heritage-Centric action involves the fewest entanglements with the parallel criminal proceeding. The Dermatology action presents the same Fifth Amendment and due process concerns for Mr. Aprahamian that motivated the Court to vacate its selection of the Teva-Centric action, a fact State Plaintiffs ignore. The Heritage-Centric action presents far fewer concerns.

(a) Choosing The Dermatology Action As The Bellwether Would Prejudice The Due Process Rights Of Mr. Aprahamian, An Indicted Individual Defendant

The Dermatology action names Mr. Aprahamian as a Defendant. Mr. Aprahamian is currently under indictment relating to the allegations in the Dermatology action (allegations that he vigorously disputes in both proceedings).[7] Mr. Aprahamian's indictment includes five products specified in the Dermatology action: carbamazepine ER tablets, clotrimazole cream, desonide ointment, fluocinonide gel, and fluocinonide ointment. This overlap "fundamentally undermine[s]" the Dermatology action as a suitable bellwether. (February 9 Opinion at 2.) It places directly at issue in the MDL the same allegations that are central to the ongoing criminal litigation involving Mr. Aprahamian. In contrast, there is ***no*** overlap between products at issue in the Heritage-Centric action and Mr. Aprahamian's indictment.

And Mr. Aprahamian is not simply "one Defendant among many" in the Dermatology action. (*Id.*) Mr. Aprahamian's name appears nearly 600 times in the Dermatology complaint, including throughout one span of more than a hundred pages of the complaint (pages 155 to 257) where he is specifically identified in multiple section headings. Accordingly, Mr. Aprahamian could face substantial prejudice from the parallel civil and criminal proceedings against him if the Dermatology action were selected as a bellwether. As the Court recognized, the "individual interests at stake" rendered the Teva-Centric action unsuitable as a bellwether. (February 9 Opinion at 3.) Those same concerns as applied to Mr. Aprahamian likewise render the Dermatology action an unsuitable bellwether.[8] Indeed, the Constitutional concerns for Mr.

[7] *United States v. Ara Aprahamian*, No. 20-cr-00064-RBS, ECF. No. 1 (E.D. Pa. Feb. 4, 2020).

[8] As the Court is aware, Mr. Aprahamian has a motion to stay pending before the Court that argues, inter alia, that his due process rights will be prejudiced absent a stay. The Dermatology action contains substantial allegations relating to Mr. Aprahamian's alleged conduct. Selecting the Dermatology action as the bellwether will profoundly compound Mr. Aprahamian's due process concerns and thus virtually guarantee substantial prejudice to Mr. Aprahamian in the MDL and/or his criminal proceeding. Mr. Aprahamian would be put in an untenable position: he would be forced to choose between waiving his Fifth Amendment rights or an adverse inference from his refusal to provide discovery and testimony in the civil case.

Aprahamian are more acute since he, as an individual, may assert his Fifth Amendment rights, whereas Teva, as a corporate Defendant, could not. (*Id*.)

In contrast, no individual Defendant in the Heritage-Centric action has been indicted.[9] Proceeding with that case as a bellwether does not present the same concerns that the Dermatology action—like the now-rejected Teva-Centric action—raises. (Certain Defendant's Submission Pursuant to PTO No. 157, ECF No. 1705 at 4 ("Defs. Br.").)

(b) The Dermatology Action Presents The Same Factual Entanglements With 10 Of The 14 Teva Indictment Products As The Teva-Centric Action

Although Teva is not a named Defendant in the Dermatology action, the "complications" that State Plaintiffs claim will be avoided by selecting it as the overarching bellwether complaint end there. (States' Br. at 1.) The text of the Dermatology complaint makes this clear, carrying forward detailed factual allegations extensively set forth in the Teva-Centric action. Rather than avoiding "complications," the Dermatology action maintains them. Specifically, the Dermatology complaint refers to the following 10 Teva Indictment products: carbamazepine tablets, carbamazepine chewables, clotrimazole, etodolac IR, etodolac ER, fluocinonide cream, fluocinonide emollient cream, fluocinonide gel, fluocinonide ointment, and warfarin. For example, with respect to etodolac and etodolac ER, the Dermatology complaint alleges:

> "The collusive relationship and interactions between Taro, Sandoz, and Teva with regard to the drugs Etodolac and Etodolac ER are addressed in greater detail in the Plaintiff States' Teva Complaint. . . . ***the collusive interactions are part of the larger pattern of conduct involving Taro, Sandoz, and Teva***, and are discussed herein to provide context . . . ***and to provide further support for the allegations herein***."

[9] Nothing in this brief should be construed as a waiver of the right of any individual's assertion of his or her Fifth Amendment rights.

(Dermatology Compl. at ¶ 789 n.6. (emphasis added).) The Dermatology complaint includes similar allegations with respect to the eight other Teva Indictment products identified above. (*Id.* at ¶ 853 n.7.)

Given State Plaintiffs' own pleading, it could not be clearer: 10 Teva Indictment products and related Teva-cCentric action allegations are embedded within the Dermatology complaint and will allegedly "provide further support for" the States' theory of the case—including its allegations of an industry-wide overarching conspiracy. In contrast, the Heritage-Centric action does not involve allegations directly tied to *any* of the products in the Teva Indictment or the Teva-Centric complaint. (Defs. Br. at 3.)

The State Plaintiffs' argument that there are "overlapping witnesses" between the Heritage-Centric action "and the Teva criminal indictment" is a red herring as there are almost certainly overlapping witnesses in the Dermatology Action as well. (*See* States' Br. at 8.) While Teva is named as a Defendant in the Heritage-Centric action, it is unquestionably preferable, from a due process perspective, for Teva to litigate *non-indictment* drugs as a Defendant in the Heritage-Centric action than for Teva and its employees to litigate on *indictment* drugs in the Dermatology action. The Dermatology complaint alleges that four current or former Teva employees engaged in misconduct on other products at issue in the Dermatology action, one of whom allegedly had numerous phone calls with Mr. Aprahamian. Contrary to their suggestion in their opening brief, State Plaintiffs' allegations in the Dermatology complaint reflect that State Plaintiffs will attempt to use evidence from current or former Teva employees to "provide further support for" the claims in the Dermatology action. (States' Br. at 7.)

Specifically, the Dermatology action contains multiple allegations concerning Teva-employee Nisha Patel's conduct, including her alleged communications with Mr. Aprahamian. It

also contains allegations regarding current or former Teva employees [redacted] (Dermatology Compl. at ¶¶ 1209-10, 1222, 1559.) [redacted] The State Plaintiffs' claim that "no current or former Teva employees will be requested to testify in order to move [the Dermatology complaint] forward," (States' Br. at 7) is thus dubious at best.

Because the Dermatology action presents the same Fifth Amendment, due process, and procedural concerns that led the Court to vacate its initial selection, substituting the Dermatology action for the Teva-Centric action makes no sense.[10]

III. State Plaintiffs Can Coordinate Discovery With DPPs and EPPs Regardless of Bellwether Selection

State Plaintiffs claim that coordination with the DPPs and EPPs regarding common clobetasol claims "will not happen if the Heritage-Centric case is selected as a bellwether," and that selecting the Dermatology action will allow the States and private plaintiffs "to efficiently coordinate and prioritize discovery related to common claims." (States' Br. at 13.) This should not bear on the Court's consideration of the issues.

There is nothing precluding plaintiffs with common claims from coordinating on discovery regardless of how cases are sequenced. Indeed, the stipulated deposition protocol apportions deposition hours to "Plaintiffs collectively." (*See* PTO No. 158, ECF No. 1688 at 12). The MDL is not sequenced to allow for bellwether depositions followed by non-bellwether depositions—all fact deposition discovery is happening now.

[10] State Plaintiffs suggest the Dermatology action may be more convenient for them because of a claimed "array of cooperating witnesses." (States' Br. at 13.) However, they fail to explain how this in any way counterbalances the significant Fifth Amendment and Due Process concerns identified in this brief.

State Plaintiffs will not get another bite at the apple if they neglect to pursue discovery on products that have been a longstanding part of this MDL, simply because of their singular focus on the bellwether. If State Plaintiffs elect not to coordinate with other plaintiffs on discovery because of case sequencing decisions, that is their prerogative. Defendants' arguments should not be discounted based on threats by State Plaintiffs to forego discovery efficiencies, ignoring the Court's (and the JPML's) directions that discovery be coordinated.

CONCLUSION

For the reasons set forth above, the undersigned Defendants respectfully request that the Court select the Heritage-Centric action as a bellwether.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2021, a copy of the foregoing Certain Defendants' Response In Support Of Their Memorandum Concerning The Revised Bellwether Selection was served on counsel of record via the Court's CM/ECF system.

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